

# Pregnant Persons as a Gender Category: A Trans Feminist Analysis of Pregnancy Discrimination

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## 1. THE PUZZLE: HOW IS PREGNANCY DISCRIMINATION BASED ON SEX?

*Geduldig v. Aiello* (1974): Discrimination on the basis of pregnancy is *not* discrimination on the basis of sex because pregnancy is unique to women as a gender.

“The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—*pregnant women* and *nonpregnant persons*. While the first group is exclusively female, the second includes members of both sexes.” *Geduldig*, 417 U.S. at 497 n.20 (my emphasis).

“There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.” *Id.* at 496–97.

The prevailing feminist response: Discrimination on the basis of pregnancy is discrimination on the basis of sex *because* pregnancy is unique to women as a gender.

“To deprive a woman . . . of disability pay because she is pregnant discriminates on the basis of sex because pregnancy has a *direct* relation to sex, and produces immediate disadvantages for employment for women only—and that is the end of the argument.” (Catharine MacKinnon, *Sexual Harassment of Working Women*, p. 123, her emphasis)

Trouble for trans feminism: If pregnancy discrimination disadvantages not just pregnant women but also pregnant men and pregnant nonbinary persons—indeed, *all* pregnant persons—how can pregnancy discrimination be based on sex?

**My view:** Pregnancy discrimination is based on sex not because pregnancy is unique to women as a gender, but because pregnant persons constitute a gender category of their own.

In fact, on my reading, it is MacKinnon’s own radical feminist theory of discrimination that commits her to the broad ideas behind this trans feminist account *avant la lettre*.

Regrettably, MacKinnon’s explicit treatment of pregnancy discrimination never follows through on that commitment.

## 2. DISCRIMINATION AS UNEQUAL SOCIAL MEANING

*Geduldig*’s account (the “differences” or “difference” conception): Discrimination is differential treatment based on a certain trait (itself).

A statute, policy, practice, (in)action, norm, institution, or structure *P* discriminates against *Fs* in a *P*-relevant context *C* on the basis of a trait *T* iff<sub>df</sub> in *C*, *P* treats *Fs* differently from similarly situated non-*Fs* on the basis of *T*.

	<i>Differences conception</i>	<i>Inequality conception</i>
<i>Nature of discrimination</i>	Differential treatment	Disadvantageous treatment
<i>Legally relevant meaning of “sex”</i>	Sex as biological difference	Gender as social meaning of sex

MacKinnon's alternative (the “inequality” or “dominance” conception): Discrimination is systematic disadvantage based on the social meaning of the relevant trait.

A statute, policy, practice, (in)action, norm, institution, or structure  $P$  discriminates against  $Fs$  in a  $P$ -relevant context  $C$  on the basis of a trait  $T$  iff<sub>df</sub> in  $C$ ,  $Fs$  are systematically (that is, nonaccidentally) disadvantaged by the social meaning of  $T$ .

Contrasting the two conceptions: Today, the Charter Day School (CDS) in North Carolina still requires all (and only) girls to wear skirts, because apparently to be a lady is to be, as the school's founder and former chair of its board explained to a concerned parent, “a fragile vessel that men are supposed to take care of and honor.”<sup>1</sup>

While the requirement certainly treats the girls differently from the boys, the boys are treated just as differently from the girls.

The discrimination consists in the unequal social meaning embodied in that differential treatment, not the equally differential treatment as such.

As two of the girls then attending CDS told the district court below:

“The dress code and the constant monitoring by teachers and school administrators made me feel like they thought girls should not play roughly, or be as active and able to move around as freely and comfortably as boys—that we simply weren't worth as much as boys.”<sup>2</sup>

“Girls having to wear skirts and dresses sends the message that girls should be less active than boys and that they are more delicate than boys. This translates into boys being put in a position of power over girls.”<sup>3</sup>

So, on an inequality analysis, discrimination based on sex is not differential treatment based on sex itself, but rather systematic disadvantage based on the social meaning of sex—that is, based on *gender*.

Sex discrimination, so clarified, has nothing to do with purported sex differences themselves, yet everything to do with the oppressive social structures and forces that nurture and beget differences, turn them into disadvantages, and then purport to be justified by these differences in the first place.

### 3. APPLYING THE INEQUALITY CONCEPTION TO PREGNANCY DISCRIMINATION

One would expect, then, that pregnancy in the sense suitable for an inequality analysis of pregnancy discrimination should likewise be a *social* status and position.

1. Quoted in *Peltier v. Charter Day School (Peltier II)*, 37 F.4th 104, 113 (4th Cir. 2022) (en banc), *petition for cert. filed*, No. 22-238 (U.S. Sept. 12, 2022). The plaintiffs challenged the dress code only as applied to cisgender girls.

2. Declaration of K.B. ¶ 19, *Peltier v. Charter Day School (Peltier I)*, 384 F. Supp. 3d 579 (E.D.N.C. 2019) (No. 16-cv-30), [https://www.aclu.org/sites/default/files/field\\_document/2017.11.29\\_ecf\\_152-8\\_kb\\_declaration.pdf](https://www.aclu.org/sites/default/files/field_document/2017.11.29_ecf_152-8_kb_declaration.pdf).

3. Declaration of I.B. ¶ 16, *Peltier I*, 384 F. Supp. 3d 579 (No. 16-cv-30), [https://www.aclu.org/sites/default/files/field\\_document/2017.11.29\\_ecf\\_152-7\\_ib\\_declaration.pdf](https://www.aclu.org/sites/default/files/field_document/2017.11.29_ecf_152-7_ib_declaration.pdf).

When a person is discriminated against on the basis of pregnancy, they are so disadvantaged not because they happen to be *pregnant*—a biological fact—but because of *gender*—the social meaning of that biology (which feminists have theorized as womanhood).

Pregnancy's unequal social meaning systematically disadvantages not just women, but anyone *taken*, *suspected*, or *expected* to be, to have been, or to become pregnant.

In employment, for example, an inequality analysis should find the injury of pregnancy discrimination not in the biological fact of pregnancy, but in “the model of the job” (MacKinnon, p. 271 n. 72), in “the disability plan” (p. 121), and in “the structure of the job market” (p. 118).

And yet, MacKinnon is all too quick to assume that women as a gender are systematically disadvantaged by the social meaning of pregnancy *because* women and only women become pregnant.

“Confronted with what looks to be a real difference between the sexes, [the differences] approach implicitly attributes it to biology. In this way, substantive judgments are made about which differences between the sexes are ‘real’ or ‘relevant’ (in terms of permissible differential consequences) without explicitly investigating which real differences and consequences may result from sexism itself.” (p. 120, my emphasis)

#### 4. PREGNANT PERSONS REDUX

What's responsible for the *Geduldig* result, I think, is not just the differences conception of discrimination (*pace* MacKinnon), or even just the differences conception of discrimination joined by a cissexist conception of pregnancy as distinctively women's. Rather, there is a third assumption:

*The binary conception of sex/gender:* To discriminate on the basis of sex just is to discriminate on the basis of *either* being a woman *or* being a man.

Even on MacKinnon's account, pregnancy discrimination is based on sex only because pregnancy's social meaning systematically disadvantages *pregnant persons qua women*.

**My proposal:** Pregnancy discrimination is based on sex because it bears on the social meaning of sex *directly* and *immediately*, not by way of womanhood.

Haslanger's insight: Gender categories can serve as a powerful analytical tool for capturing and theorizing gender as the social meaning of sex.

*The category of women:*  $S$  is a woman iff<sub>df</sub>  $S$  is systematically subordinated along some dimension (economic, political, legal, social, etc.), and  $S$  is “marked” as a target for this treatment by observed or imagined bodily features presumed to be evidence of a female's biological role in reproduction.

Taking a page from Haslanger's analysis of racial categories, we might say,

*Gender categories:* A category is gendered if its members are socially positioned as subordinate or privileged along some dimension (economic, political, legal, social, etc.), and the category is “marked” as a target for this treatment by observed or imagined bodily features presumed to be evidence of a certain biological role in reproduction.

In light of this understanding of gender categories, it makes sense to think of the category of persons systematically disadvantaged by the social meaning of pregnant bodies too as constitutive of a gender category—let's say, *pregnant persons*:

*The category of pregnant persons:*  $S$  is a pregnant person iff<sub>df</sub>  $S$  is systematically subordinated along some dimension (economic, political, legal, social, etc.), and  $S$  is “marked” as a target for this treatment by observed or imagined bodily features presumed (taken, suspected, expected, etc.) to be evidence of a (presently, previously, or future) pregnant body.

Haslanger again:

“I offer this analysis as a way of capturing the standard slogan: gender is the social meaning of sex. Note, however, that in imagining ‘alternative’ genders we should be careful not to take for granted that the relevant biological divisions will correspond to what *we* consider ‘sex.’ (Alternative groupings could include: ‘pregnant persons,’ ‘lactating persons,’ ‘menstruating persons,’ ‘infertile persons,’ (perhaps ‘homosexuals,’ depending on the story given about physical causes)). Neither should we assume that membership in a gender will constitute one’s personal or psychological identity to any significant degree.” (Haslanger, “Gender and Race,” p. 50, my emphasis)

So, pregnancy can be gendered even if it is not gendered *woman* or even sexed *female*.

Discrimination against pregnant persons is directly and immediately discrimination based on sex—properly understood, based on gender as the social meaning of sex—without having to be routed through womanhood.

Since the category of pregnant persons is itself gendered, to disentangle pregnancy from womanhood is *not* to ungender pregnancy (cf. Barnes, MacKinnon, Ginsburg).

The category *pregnant persons*, on my account, will include persons who are not, and perhaps may not be capable of becoming, pregnant (cf. “No Uterus, No Opinion”).

The account does not run into Jenkins-style worries about wrongful exclusion/marginalization/inclusion (genders vs. gender categories).